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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 111

JULIUS ROSENBERG AND ETHEL ROSENBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 112

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (R. 1640-1682, 1709-1713) are reported at 195 F. 2d 583.

JURISDICTION

The judgments of the Court of Appeals were entered on February 25, 1952 (R. 1682-1683), and petitions for rehearing (R. 1683-1708) were denied on April 8, 1952 (R. 1713-1714). On April 30, 1952, Mr. Justice Jackson extended the time for filing petitions for writs of certiorari to June 7, 1952 (R. 1714-1715), and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether Sections 2(a) and 4 of the Espionage Act of 1917 are so vague and indefinite as to violate petitioners' rights under the First and Fifth Amendments.

2. Whether the indictment is insufficient for failure to allege that the information the alleged conspirators conspired to pass was secret.

3. Whether references by the prosecutor in his arguments and the trial court in its charge to traitors and treasonable conduct so confused the nature of the charge against petitioners with treason as to deprive them of a fair trial.

4. Whether the record shows that conduct of the trial judge deprived petitioners of a fair trial in violation of the Fifth and Sixth Amendments,

(a) by a course of conduct displaying bias against petitioners and conveying to the jury his belief in their guilt;

(b) by stating to the jury, in the course of his

instructions, that the existence of an international state of tension made "the enforcement of the espionage laws [take] on a new significance";

(c) by failing, in the course of reviewing the evidence, to state the grounds for attack by petitioners on the credibility of certain witnesses, although he did in fact refer to their possible bias;

(d) by failing to have read to the jury certain testimony which they did not request.

5. Whether admission of the following evidence deprived petitioners of their rights under the First, Fifth and Sixth Amendments:

(a) statements by petitioners indicating preference for the Soviet Union, to establish their intent;

(b) evidence tending to show (1) membership in the Communist Party, and (2) the obligation to aid the Soviet Union arising from such membership, again to establish petitioners' intent;

(c) evidence tending to show the connection between other persons in the Soviet spy network and Julius Rosenberg, to corroborate details of the stories of witnesses whose testimony was already properly in evidence.

6. Whether a government rebuttal witness should have been excluded under 18 U.S.C. 3432 because his name was not included on the list of witnesses required by that section.

7. Whether the imposition of the death sentence on the petitioners Julius and Ethel Rosenberg is "cruel and unusual" punishment in violation of the Eighth Amendment.

8. Whether any irregularities in Sobell's arrest in and expulsion from Mexico affected the jurisdiction of the trial court where the question was raised for the first time after the return of the verdict against him.

9. (a) Whether Sobell was shown by substantial evidence to have participated in a single conspiracy with all of the co-defendants as charged in the indictment, and (b) whether this issue was properly submitted to the jury.

10. Whether the admission in evidence against Sobell of certain testimony tending to show that he went to Mexico to avoid arrest deprived him of a fair trial.

STATUTE INVOLVED

The Espionage Act of 1917, 40 Stat. 217, 218, 219, 50 U.S.C. 32, 34, provided in relevant part:[1]

> Section 2.
>
> (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen

[1] These sections were repealed by Section 21 of the Act of June 25, 1948, 62 Stat. 683, revising the Criminal Code, and were reenacted in substantially the same terms as Section 794 of the Code.

thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided,* That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years * * *.

* * * * *

Section 4.

If two or more persons conspire to violate the provisions of sections two or three of this title and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

STATEMENT

On January 31, 1951, a grand jury of the United States District Court for the Southern District of New York returned an indictment charging that (R. 2):

* * * On or about June 6, 1944, up to and

> including June 16, 1950, * * * Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as "John," David Greenglass and Morton Sobell, the defendants herein, did, the United States of America then and there being at war, conspire, combine, confederate and agree with each other and with Harry Gold and Ruth Greenglass, named as co-conspirators but not as defendants, and with divers others presently to the Grand Jury unknown, to violate sub-section (a) of Section 32, Title 50, United States Code, in that they did conspire, combine, confederate and agree, with intent and reason to believe that it would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the National Defense of the United States of America.

The remainder of the indictment listed 12 overt acts alleged to have been committed in furtherance of the conspiracy between June 6, 1944, and January 14, 1945 (R. 3-4). All of the petitioners pleaded not guilty (R. 27, 28, 30). Before trial, they challenged the constitutionality of the Espionage Act and the sufficiency of the indictment. Their motions were denied (R. 160-173).

At the trial, witnesses for the Government testified to the following:

Defendant David Greenglass, who entered a plea of guilty and testified on behalf of the Government, was, in November 1944, a soldier in the United States Army, working as a machinist at the atomic experimental project at Los Alamos, New Mexico (R. 398-399). At that time, Ruth Greenglass, his wife, was about to make a trip from her home in New York to see her husband (R. 422, 678). Shortly before she left, Ruth visited the petitioners Ethel and Julius Rosenberg, who were, respectively, the sister and brother-in-law of David (R. 423, 678). On this occasion, Julius told Ruth that he and Ethel had not been so active in the Communist Party of late because he had been trying to help the Russians more directly than by membership in the Party (R. 423-424, 679). Julius went on to tell Ruth that David was working on the atomic bomb (R. 424, 679). He stated that the bomb had tremendous destructive effect and that the United States and Britain were working jointly on its development (R. 679); and further, that "he felt that the information should be shared with Russia * * * because if all nations had the information then one nation couldn't use the bomb as a threat against another" (R. 679). He wanted Ruth "to tell * * * David that he should give information to Julius to be passed on to the Russians" (R. 679). On Ruth's initial demurrer, Ethel encouraged her at least to tell David what Julius wanted so that David could decide for himself, stating also that "this was right for David" (R. 424-425, 679-680).

Pursuant to this conversation, Ruth did make the request of David on her visit to him, and, after initial hesitation (R. 425), David furnished to Ruth information relating to the location of the project, its security measures, and the names of certain of its personnel (R. 426-427, 683-684), all of which information was secret (R. 406-408, 410-411, 427, 468, 890, 901-902), and all of which David knew was not supposed to be transmitted (R. 406-408, 427). Ruth gave this information to Julius on her return to New York (R. 685).

Later, on trips to New York on furlough in January and September of 1945, David passed further information to Julius. The information passed in January included "a list of people who seemed sympathetic with Communism and would help furnish information to the Russians" (R. 438), a full written report of what David knew of the experiments conducted at Los Alamos, sketches of high explosive lenses, lens molds, and descriptive material relating to these sketches (R. 428-429, 438-439, 686). David's handwritten report containing this information was typed by Ethel (R. 443, 687, 691).[2] In September, David wrote up and delivered to Julius approximately 12 pages of data, which included a descriptive material concerning the atom bomb and its component parts, a sketch of a cross-section of the assembled bomb,

[2] While David was in New York on this trip, Julius also arranged for him to meet a person whom Julius described to David as a Russian, who questioned David about high explosive lenses, their curvature, and means of detonation (R. 432-434).

as well as some scientists' names and possible recruits for espionage (R. 495-500, 702-705; Ex. 8).[3] Again, Ethel typed the data (R. 513, 704).

In addition to passing data to Julius directly, David on one occasion, and pursuant to Julius' arrangements, passed data to Harry Gold (R. 459, 701). At the time of David's January 1945 trip to New York, a signal arrangement had been made between the Greenglasses and the Rosenbergs so that information could be obtained from the Greenglasses while they were in New Mexico (R. 446-447, 689-690). Julius had cut off the side of a Jello box and cut it in two in an irregular fashion. One half he gave to Ruth, the other half he kept, stating: "This half will be brought to you by another party and he will bear the greetings from me and you will know that I have sent him" (R. 689; Ex. 4B). In June 1945, Harry Gold appeared at the Greenglasses' Albuquerque, New Mexico, apartment with greetings from "Julius" and identified himself with the piece of the Jello box the Greenglasses had last seen in Julius' hand (R. 455-457, 699-700). David gave Gold a report containing sketches of the lens mold used in the atom bomb, together with descriptive material and a list of possible recruits for Soviet espionage (R. 459, 701). David also reported that a test explo-

[3] It should be noted that Julius had in January given David a general description of the atom bomb to facilitate the latter's quest for additional information (R. 491, 493-494). This bomb was the type later dropped on Hiroshima, Japan (R. 493-494). However, the bomb which David described to Julius in September 1945 was an improved type which was subsequently dropped on Nagasaki, Japan (R. 495, 910-912).

sion was to be conducted at Alamogordo, New Mexico, in July 1945 (R. 520).

According to Gold's testimony, he was given this Greenglass assignment and the Jello-box identification by the defendant Anatoli Yakovlev (R. 822), who was a citizen of the Soviet Union employed in the Soviet Consulate in New York (R. 845-847) and to whom Gold delivered the data.[4]

Testimony was introduced to show that the data delivered to Gold, as well as the other scientific data passed directly to Julius, were secret and valuable, and that scientists with knowledge of the general field could determine from the data furnished the important principles that were involved (R. 470-479).

At the time of David's September 1945 furlough, it appeared that he would soon be discharged from the Army. Julius urged him to remain at Los Alamos in a civilian capacity, if he could, in order that he could continue to furnish information (R. 512, 707). However, David declined to do so and in 1946 returned to New York and entered a machine shop business with Julius and several others (R. 513-514, 708). At various times while David was working in the business, Julius told him that he wanted him to go to college to reestablish contacts he had made with scientists at Los Alamos and to make new contacts, that money was not a problem, and that whatever was neces-

[4] Gold also testified that Yakovlev subsequently told him that the data had been transferred to his superiors in the Soviet Union and that it was very useful (R. 831).

sary to make Ruth and David comfortable would be furnished by the Russians (R. 515-516, 708). Julius also stated that he had contacts in the General Electric Company at Schenectady, New York, and in Cleveland, who were furnishing him information (R. 516).

In February 1950, when the arrest of Klaus Fuchs was publicized, Julius went to David and told him that Fuchs' contact was the man who had got data from Ruth and David in June 1945; that Fuchs' arrest meant that the Greenglasses' activities would be discovered; and that therefore they would have to leave the country (R. 523). These warnings were renewed at the time of the arrest of Harry Gold (R. 525-526, 709) in May 1950. During that month, Julius gave David $1,000, and promised him more, in order that David and Ruth might discharge their obligations and leave the country (R. 526, 710). In addition, he gave them specific and detailed instructions as to how to get to Mexico and ultimately to the Soviet Union (R. 526-530, 710).

Julius informed the Greenglasses that he and his wife also were going to flee and that they would meet the Greenglasses in Mexico (R. 529, 713). Rosenberg did, in fact, ascertain from his physician what inoculations were needed for a trip to Mexico (R. 851), and he had passport pictures taken of himself and his family (R. 1427-1429).

On May 30, 1950, in accordance with Julius' request, the Greenglasses had six sets of passport pictures taken, five of which they gave to Julius

(R. 530-531, 712). The sixth set was retained by Greenglass and introduced in evidence at the trial (R. 531, 712; Ex. 9A, 9B). A week later, Julius visited the Greenglasses' apartment and gave David $4,000 wrapped in brown paper (R. 532, 713; Ex. 10). He asked David to repeat the flight instructions, which David did (R. 532-533). David gave the $4,000 to his brother-in-law, Louis Abel, who, after David's arrest, turned it over to the latter's lawyer (R. 536, 713, 794-795).

Max Elitcher, who had been a classmate of the petitioner Morton Sobell in engineering at the City College of New York and who had later roomed with him in Washington, D. C., when both were working there, was, in June, 1944, employed in the Bureau of Ordnance of the Navy Department in Washington (R. 197). At that time, Rosenberg, who had known both Elitcher and Sobell at college, visited Washington and asked Elitcher whether he would contribute military information to be passed on to the Russians (R. 207). The request was prefaced with the observation that the war effort of the Soviet Union was being impeded because "some interests in the United States" were denying it the benefit of a good deal of military information (R. 207), and to counteract this, many people were furnishing the Soviet Union with classified information about military equipment (R. 207). Rosenberg assured Elitcher that any information he might contribute would be returned to him after it was microphotographed and that definite precautions would be taken to prevent the microfilm from fall-

ing into the wrong hands (R. 209-210). Apparently to reassure Elitcher further, Rosenberg stated that Sobell was among those furnishing information for transmission to Russia (R. 235-237).

A few months after this conversation, in September 1944, Elitcher and Sobell were vacationing together in West Virginia (R. 238-239). Elitcher told Sobell that Rosenberg had visited him, had requested him to supply military information for Russia, and had informed him that Sobell was a contributor (R. 239). At this point, Sobell became very angry, stating: "He should not have mentioned my name. He should not have told you that" (R. 239). Despite Elitcher's efforts to persuade Sobell that Rosenberg knew that they were close friends and therefore felt safe in confiding in Elitcher, Sobell's anger continued: "It makes no difference, he shouldn't have done it" (R. 239).

Although Elitcher visited Rosenberg in June 1945 (R. 239-240), when Rosenberg told of his dismissal as a civilian employee of the Army Signal Corps (see R. 1057-1058) because of his Communist Party Activities (R. 243), it does not appear that another request for data was made until September of that year. At that time, Rosenberg pointed out to Elitcher that, although the war was over, there was a continuing need for new military information for Russia (R. 243-244). Rosenberg asked Elitcher if he would contribute, and the latter replied he would let Rosenberg know (R. 244).

In the course of his duties with the Bureau of

Ordnance, Elitcher had occasion from time to time to visit the General Electric Plant in Schenectady, New York, where Sobell was then working (R. 244-245). On one of these visits, in the early part of 1946, Sobell sought from Elitcher an ordnance pamphlet on a fire-control system on which Elitcher was working (R. 245-247). The pamphlet was classified and not available for public use (R. 246). On another visit, later in 1946, Sobell again asked about the status of the ordnance pamphlet (R. 248). Upon being informed that the pamphlet was not yet completed, Sobell suggested that Elitcher see Rosenberg in regard to it (R. 248-249). Acting on this suggestion, Elitcher subsequently saw Rosenberg in New York City (R. 251-252). At that time, however, Rosenberg stated that he thought there had been a "leak" in his espionage set up and that he preferred Elitcher not to visit him until he was notified to do so (R. 252). He also told Elitcher to discontinue his Communist Party activities (R. 252).

In the latter part of 1947, Sobell shifted his employment from the General Electric Company in Schenectady to the Reeves Instrument Company in New York City (R. 253), continuing, however, to work on classified projects (R. 253). At about this time, Elitcher visited Reeves and saw Sobell. Sobell inquired whether Elitcher knew of any engineering students "who were progressive." Elitcher replied that he did not, but that if somebody came along, he would let Sobell know (R. 254). Elitcher then described to Sobell certain difficulties he was

having with his wife. Sobell immediately asked Elitcher whether she knew anything about "this espionage business" (R. 254-255). Elitcher said he thought she might know something but that he wasn't sure. Sobell replied, "Well, that isn't good" (R. 255).

In June 1948, Elitcher decided to leave the Bureau of Ordnance to take a job in New York (R. 256). When he informed Sobell of his plans, the latter urged him not to do anything until he discussed the matter with Rosenberg (R. 256).[5] Pursuant to arrangements made by Sobell, Elitcher met Rosenberg and Sobell in midtown New York (R. 256-257). When Rosenberg was told about Elitcher's plans, he tried to persuade Elitcher to remain in Washington, stating that he needed a source of information in the Navy Department (R. 257). Rosenberg further stated that he had already made plans for Elitcher to meet a contact in Washington (R. 257). During this conversation, Sobell also attempted to persuade Elitcher to stay at the Bureau of Ordnance; he told Elitcher, "Well, Rosenberg is right, Julie is right; you should do that" (R. 257).[6]

Sobell then left and Elitcher had dinner with Rosenberg (R. 257). During the course of dinner, Rosenberg said that money could be made available for the purpose of sending Elitcher to school to

[5] Elitcher testified that Sobell said, "Don't do anything before you see me. I want to talk to you about it, and Rosenberg also wants to speak to you about it" (R. 256).

[6] Elitcher, nonetheless, did not change his mind, and shortly afterwards changed his employment (R. 257, 255).

improve his technical status (R. 258). Elitcher asked Rosenberg how he had got "started in this venture" (R. 258). Rosenberg replied that a long time ago he had decided that this was what he wanted to do; that he made it a point to get close to people in the Communist Party and kept getting from one person to another until he finally succeeded in approaching a Russian "who would listen to his proposition concerning this matter of getting information to Russia" (R. 258).

A month later, in July 1948, Elitcher drove with his family from Washington, D.C., to New York City, preparatory to changing his job (R. 259). On the way, he noticed that he was being followed (R. 259-260). Upon his arrival in New York, he proceeded to Sobell's home, where he planned to stay overnight (R. 259). When Elitcher told Sobell of his fear that he had been followed, Sobell became angry and said that Elitcher should not have come to his house; that he had some valuable information in the house that he should have given Rosenberg some time ago, information that was "too valuable to be destroyed and yet too dangerous to keep around" (R. 260-261). Over Elitcher's protests, Sobell insisted the information be delivered to Rosenberg that night. Sobell then took a 35 millimeter film can from his house, and, accompanied by Elitcher, drove to Manhattan. While Elitcher waited in the car, Sobell left to deliver the can to Rosenberg. When Sobell returned, Elitcher asked him what Rosenberg thought about his being followed (R. 261). Sobell replied that Rosenberg said

that he had "once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right" (R. 261). The two then returned to Sobell's house (R. 261).

Subsequently, in October 1948, Elitcher moved to New York and took a job with the Reeves Instrument Company, where Sobell was working (R. 253, 255). One night, while returning from work, Sobell again asked Elitcher whether he knew any engineering students who would be likely sources of military information. This time, however, Sobell stated that he wanted students who were not involved in any progressive activities "so that they would not be suspected" (R. 255). Again, Elitcher replied that he did not know any (R. 255-256).

In June 1950, Sobell and his family went to Mexico in a manner which parallelled Rosenberg's instructions to Greenglass. For a time, they lived in Mexico City (R. 920-921). There, Sobell asked a neighbor, one Rios, whether he knew of a way one could leave Mexico without having his papers in order. He told Rios that he was worried because the military police were on the lookout for him to take him back into the United States Army, and that he was afraid to return to the Army because he had already experienced one war (R. 922-923). He then asked Rios for instructions on how to go to Vera Cruz, the leading seaport in Mexico (R. 923). The statement by Sobell that the military police were looking for him was untrue. Sobell had not served in the Army during the war but had at all

times been in a deferred classification (R. 964).

While away from Mexico City, Sobell sent two letters to his wife, addressed, however, to his neighbor, Rios, one postmarked from Vera Cruz, the other from Tampico, the second largest seaport in Mexico (R. 924-926). In his travels to these seaports and return to Mexico City, Sobell used at least five different aliases (R. 928, 931, 933, 936, 937-938). He also sent two letters from Mexico City, bearing fictitious return names and addresses, to relatives in the United States through a friend in New York City (R. 863-867). Sobell was ultimately apprehended by the Mexican police and expelled from Mexico (R. 1024-1031).

In addition to testimony showing this chronology of events, the Government introduced the testimony of Elizabeth Bentley to show the character of the Communist Party as a subject organ of the Communist International (R. 976-977), which had its headquarters in, and "only served the interests of," Moscow (R. 978, 983, 984).

In addition, she testified that on the basis of long and varied experience in the Party, membership required either obedience to the Party and to the interests of Moscow or expulsion (R. 979, 983).[7]

It was shown that Sobell had been a member of the Party at least from 1939 to 1941 (R. 223-224, 229); that he had recruited Elitcher into the Party (R. 203-204, 224); that he had for some time dur-

[7] She was thoroughly cross-examined on the adequacy of her knowledge to make this statement (R. 996-1016, 1013-1022).

ing that period been chairman of his Party unit and, as such, had, among other things, instructed its members to gather support for the Hitler-Stalin pact and for Russia generally and to infiltrate certain organizations (R. 225-227).

The testimony of Ruth and David Greenglass relating to the Rosenbergs' efforts to recruit them for espionage showed that the Rosenbergs, also, had been members of the Party (R. 423-424, 679). Rosenberg had also stated to Elitcher that he had been a member of the Party (R. 258; *supra*, p. 15).

At the close of the trial, Sobell moved for acquittal on the ground that, at best, two conspiracies had been proved, and that he was shown to have participated in only one of them; and that his trial together with alleged atomic spies was irremediably prejudicial (R. 1443-1445). All of the petitioners renewed their challenges to the constitutionality of the statute and the sufficiency of the indictment (R. 1441-1442). In addition, the Rosenbergs raised the further contention that the attitude and conduct of the trial court throughout the trial had made a fair judgment impossible (R. 1442-1443), and they asked for a mistrial. The various motions were denied.

The jury returned verdicts of guilty (R. 1579). Petitioners thereupon moved for new trials and in arrest of judgment, urging allegedly erroneous trial rulings and their earlier challenges to the statute and indictment (R. 1586-1587). At this time, Sobell, for the first time, challenged the jurisdiction of the court on the ground that he was

brought back from Mexico forcibly (R. 1587-1589). The motions were denied.

The court sentenced petitioners Julius and Ethel Rosenberg to death (R. 27-29, 1616) and petitioner Sobell to 30 years' imprisonment (R. 30, 1620). On appeal, the judgments of conviction were affirmed (R. 1682-1683), unanimously as to the Rosenbergs, but with Judge Frank dissenting as to Sobell (R. 1640-1682).

ARGUMENT

1. Petitioners' first contention, that the statute under which they were convicted is invalid under the First and Fifth Amendments (No. 111, Pet. 19-26; No. 112, Pet. 44-45), is plainly unsound. Petitioners do not contend that Congress may not constitutionally proscribe the transmission of military secrets to a foreign power, even though this plainly limits their freedom to speak and communicate about such matters. Nor do they contend that there is doubt whether their conduct is within the ambit of the statute. Their contention is simply that Congress, in proscribing the transmission of certain data, has failed to say with sufficient clarity just what kinds of data are meant.

But this contention was fully answered by this Court 12 years ago. In *Gorin* v. *United States*, 312 U. S. 19, the Court upheld this very same statute[8] against a contention that it violated the Fifth Amendment because it failed to define with suffi-

[8] It also dealt with section 1(b) of the Espionage Act of 1917, in addition to the section involved here.

cient definiteness the kinds of information included within its proscriptions. Speaking for a unanimous Court, Mr. Justice Reed said (312 U. S. at 27-28):

> * * * [W]e find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established. Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words "national defense" has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911. The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We

> agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by §§ 1 (b) or 2 (a) depends upon its relation to the national defense, as so defined, not upon its connection with places specified in § 1 (a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

See also *United States* v. *Heine*, 151 F. 2d 813 (C.A. 2), certiorari denied, 328 U. S. 833, where the Court of Appeals for the Second Circuit construed the language, "relating to the national defense", to exclude information made public by Congress or the military departments, and, as thus construed, tacitly recognized its constitutionality.

Although a challenge under the First Amendment to an allegedly vague statute may in some situations raise a different problem than a challenge under the Fifth Amendment (but cf. *Dennis* v. *United States*, 341 U. S. 494, 515-516), no such issue is involved here. For the established construction that the statute is applicable only where *scienter* is established, where the data relate to national defense, and where they are secret, surely precludes a contention that the statute impinges upon freedom of communication. The First Amendment cannot be invoked as a shelter for espionage. Cf. *Chandler* v. *United States*, 171 F. 2d 921, 938-939 (C.A. 1), certiorari denied, 336 U. S. 918, and page 23 of the *Gorin* opinion, where, in discussing the petitioners' contentions, the Court adverted to their reliance

"upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country." See also *United States* v. *Heine, supra,* at 815.

2. Petitioners next contend that the indictment was insufficient because it did not allege that the data which they conspired to pass were secret (No. 111, Pet. 26-27; No. 112, Pet. 44-45). The allegation was not necessary. It has been held that Section 2 of the Espionage Act of 1917 does not cover non-secret data. *United States* v. *Heine, supra;* cf. *Gorin* v. *United States, supra.* This reading was drawn from the language and context of the section. An indictment framed, as the present one, essentially in the language of the section sufficiently indicates the element of secrecy. Compare *Hagner* v. *United States,* 285 U. S. 427; see also *Rose* v. *United States,* 149 F. 2d 755, 758 (C.A. 9).

The indictment was sufficient to enable petitioners to understand the nature of the charge against them and to prepare their defenses. [redacted] It certainly cannot be argued that petitioners were prejudiced during trial, for the argument on their motions to dismiss the indictment shows that their counsel were cognizant of the strictures of the *Heine* decision and based their motions, in this respect, upon that decision (R. 170-171). Finally, it is clear that the indictment was sufficient to enable them to plead the judgment in bar of another prosecution should occasion to do so arise. Cf. *United States* v.

Josephson, 165 F. 2d 82, 85 (C.A. 2), certiorari denied, 333 U. S. 838; *Carter* v. *United States*, 173 F. 2d 684, 685 (C.A. 10) certiorari denied, 337 U. S. 946; *Robertson* v. *United States*, 168 F. 2d 294 (C.A. 5) (holding that an omission from an indictment, though improper, was not prejudicial).

3. Petitioners advance numerous reasons why their trial was unfairly conducted. They first urge that the prosecution and the trial judge "poisoned" their trial by making and permitting references to "treason" and "traitorous" and "disloyalty" in speaking of petitioners, thereby subjecting them to the prejudicial passions aroused by a treason charge, without according them the protection of the two-witness rule. Consequently, they conclude, their conviction was in violation of the mandate of the treason clause of the Constitution (No. 111, Pet. 27-30; No. 112, Pet. 44).

This contention seems to have been suggested for the first time in the Rosenbergs' petition for rehearing in the Court of Appeals (R. 1697).[9] There were no objections at the time the statements were made.

But this aside, the "poison" allegedly introduced cannot have been very noxious. Petitioners have called attention, in all, to some 18 sentences in the record (No. 111, Pet. 29-30). Eight of these were

[9] In their petition for rehearing in the Court of Appeals (R. 1697-1700), the Rosenbergs seem to have argued, also for the first time, that as construed and applied by the Court of Appeals the Espionage Act permits punishment for acts that meet the constitutional definition of treason, but without its safeguards, and is therefore itself unconstitutional (R. 1697-1700), an argument which was rejected by that court (R. 1709-1713). That does not seem to be their present argument.

in the opening statement of the prosecutor (R. 180, 181, 182, 183, 184), and five in his closing statement (R. 1517, 1518, 1535). One was in the charge of the judge (R. 1550), and four in his statement at the time of sentencing the Rosenbergs (R. 1613, 1614, 1615).

In their contexts, it is clear that all that was meant by the references was that petitioners were not acting as loyal Americans would.[10] If they did what they were charged with, this can hardly be gainsaid. Moreover, the jury were warned often that what was said by counsel did not prove guilt (R. 1516, 1544, 1563). Even without such warning, the jury can be assumed to be capable of spotting

[10] A few examples of petitioners' references to the United States Attorney's opening are these:

"The evidence will show that the loyalty and allegiance of the Rosenbergs and Sobell were not to our country * * *" (R. 180).

"* * * the evidence will show that the primary allegiance of these defendants was not to our country * * *" (R. 181).

"The evidence will show their loyalty to and worship of the Soviet Union, and by their rank disloyalty to our country these defendants joined * * * in a * * * conspiracy to deliver to the Soviet Union, the information and the weapons which the Soviet Union could use to destroy us" (R. 181).

"These traitorous activities, this constant concern for recruiting Americans into this espionage ring, the clandestine delivery of secrets, stolen from our Government, to Soviet agents, through these defendants, continued through these years" (R. 183).

In his closing statement, the United States Attorney said, *inter alia*:

"These defendants * * * are parties to an agreement to spy and steal from their own country * * *. It [a foreign power] would use the produce of these defendants, the information received through them, from these traitors, to destroy Americans and the people of the United Nations" (R. 1535).

both the prosecutor's occasional rhetorical flourishes and the fact that "traitor" and "treasonous" have a looser, non-constitutional meaning that is quite appropriate in this case. See Webster's New International Dictionary (Merriam-Webster, 2d ed. 1951) pp. 2687, 2698.

The court's instructions, totalling 24 printed pages (R. 1542-1567), moreover, clearly explained the charge against petitioners (R. 1545-1548, 1550-1554). In the context of its length and substance, the one use of the word "traitors" (R. 1550) diminishes into trivial insignificance. The statements of the court on sentencing of which petitioners complain, which again were obviously rhetorical (R. 1613, 1614, 1615), could not have affected the quality of petitioners' trial.

4. (a) Petitioners next contend that they were deprived of a fair trial because the judge displayed bias against them and conveyed to the jury an impression of his belief in their guilt (No. 111, Pet. 31-35; No. 112, Pet. 44). The objection is not to particular rulings, but to aggregate and cumulative alleged misbehavior that reached "enormity" (No. 111, Pet. 33).

The trial judge overruled this objection, because it was made for the first time at the close of all the evidence in the form of a motion for a mistrial, because he did not believe it was made in good faith, and because he thought it was unfounded (R. 1442-1443). Cf. *Ochoa* v. *United States*, 167 F. 2d 341, 345 (C.A. 9). Although the misconduct, if any, under petitioners' theory, was the result of indi-

vidual accretions too small in themselves to support a motion for a mistrial, it is clear that the "enormity" of the judge's alleged misconduct must have become substantial enough to complain of long before the termination of the trial. This Court has properly said: "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser* v. *United States*, 315 U. S. 60, 83; cf. *Breedin* v. *United States*, 73 F. 2d 778, 780 (C.A. 4).

But beyond that, observations freely made by counsel for petitioners belie their contention. Even after the denial of the motion for a mistrial, the Rosenbergs' counsel said in his summation that "we feel that the trial has been conducted * * * with that dignity and that decorum that befits an American trial" (R. 1453). And, later, the same counsel stated that "the Court conducted itself as an American judge" (R. 1603).

But even if it is assumed that the objection was not merely an afterthought, it is plain that petitioners fail to take account of the duty of the judge in a federal criminal trial "to see that a case on trial is presented in such way as to be understood by the jury as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts he developed may hurt or help one side or the other." *Simon* v. *United States*, 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U. S. 694, quoted by the court below (R. 1651-1652). See also *Glasser* v. *United States*, *supra*, p. 83; *Quercia* v. *United*

States, 289 U. S. 466, 469; *Ochoa* v. *United States,* 167 F. 2d 341, 344 (C.A. 9); *United States* v. *Aaron,* 190 F. 2d 144, 146 (C.A. 2), certiorari denied, 342 U. S. 827.

The bias of the trial judge is said to be demonstrated by a collection of his questions which are alleged to reveal an attempt to emphasize the strong points in the Government's case, to protect and rehabilitate Government witnesses, to minimize defense evidence and contradictions in the Government's evidence, and to subject the Rosenbergs [11] to hostile cross-examination, both on their direct testimony and on their cross-examination by government counsel.

Examination of petitioners' "documentation" (in the Appendix to the Rosenbergs' petition) will show:

(1) The Appendix is, throughout, basically a distorted and unfavorable commentary and does not consist simply of excerpts from the record.

(2) Petitioners seize on the slightest attempt at clarification by the judge, such as asking a witness to fix a date (compare R. 256 with App. 1) or a location (compare R. 456 with App. 2), as illustrative of the court's attempt to help the Government's case.[12]

(3) Petitioners' present complaint that they

[11] Sobell did not take the stand.

[12] Petitioners charge, for instance, that the judge "caused a review of Julius' statement to Elitcher that others were giving military information to the Soviet Union (R. 236) and belabored the point (R. 236-237)." The record shows that

were not allowed effective cross-examination of the Government's witnesses is refuted by the comment of the Rosenbergs' counsel to the jury that "we got a pretty good picture here of them testifying, because you have been fortunate, because the Judge has been fairly lenient in permitting counsel to develop for you the kind of people who testified here" (R. 1465).

(4) The judge's interruptions of the Rosenberg's direct examination were infrequent, and were designed to develop more fully the facts about which they were testifying (e.g., R. 1084, 1086, 1090-1091, 1097, 1120, 1124-1125, 1142, 1299-1300, 1322).

(5) The flat contradictions by the Rosenbergs of earlier testimony made it inevitable that they would be peculiarly vulnerable to cross-examination.

Finally, the judge made it as explicit as possible, almost from the beginning of the trial, that it was for the jury alone to determine what the facts were (R. 231, 1544, 1563-1564). And toward the close of his final instructions he admonished the jury at length that they should put out of their minds any "impression that the judge has some opinion with reference to the guilt or innocence of the defendants, or that he thinks that some par-

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the judge asked two short questions (R. 236) on this matter, and a reading of the course of the testimony will show that it was done to clarify and pin-point exactly what was said. It is obvious that the conversation between Rosenberg and Elitcher was an important one. Examination of the next several pages (R. 237-240) of the testimony shows only two further questions asked by the judge, neither of which was directed to the point complained of.

ticular phase of the case is more important than another, or that some particular witness is more credible than another or that a certain inference of fact should or should not be made and so on" (R. 1563).

(b) Petitioners assert (No. 111, Pet. 35-36; No. 112, Pet. 44) that they were prejudiced by a statement in the judge's charge that "Because of the development of highly destructive weapons and their highly guarded possession by nations existing in a state of tension with one another, *the enforcement of the espionage laws takes on a new significance.* Our national well-being requires that we guard against spying on the secrets of our defense" (R. 1550). (Emphasis is petitioners'.) This was, it is contended, in its context, an invitation to the jury to base its verdict "on the emotional bias of the jurors, and misguided notions of their responsibility as patriotic citizens" (No. 111, Pet. 36).

The claim is insubstantial. In the very next sentence, the judge cautioned the jury that he did "not mean that the mere allegation or use of the word 'espionage' should justify convicting innocent persons * * *" (R. 1550). Moreover, at the outset of his charge the judge told the jurors that it was their duty "to approach your task of determining the issues with your minds completely barren of prejudice or sympathy", and "to weigh the evidence in this case calmly and dispassionately, without sympathy or prejudice, for or against either the Government or the defendants" (R. 1543). He then stressed that the very importance of the

case made it all the more important that the jurors heed his "words of caution" (R. 1544). Later he stated that nothing in his instructions was intended to create the impression that he entertained an opinion as to the guilt or innocence of the petitioners, and that if the jury had formed any such impression they should "utterly disregard it" (R. 1563). Finally, the jury were emphatically instructed that they "should not hesitate for any reason" to acquit if they found that the law had not been violated (R. 1566).

A reading of the entire charge leaves no doubt that the case was submitted to the jury on the evidence alone. Indeed, counsel for the Rosenbergs conceded as much after the verdict was returned when he stated to the jury: "I feel satisfied by reason of the length of time that you took for your deliberations, as well as the questions asked during the course of your deliberations that you examined very carefully the evidence and came to a certain conclusion" (R. 1583).

(c) The Rosenbergs also complain that in summarizing their contentions as to why the Greenglasses testified against them, the judge failed to specify self-preservation as a motive (No. 111, Pet. 36-37). They argue that this was the point most stressed by the defense in summation, and that its ambiguous eclipse in the charge fatally beclouded the issue for the jury.

The judge specifically called the jury's attention to the summations and stated that for that reason he would not discuss them further (R. 1562, 1568).

Moreover, the jury were told that their recollections of the evidence governed (R. 1544), and that the judge's reference to "some portion of the evidence and not to another should not be taken * * * as any indication as to [his] opinion of the comparative importance or weight of that particular evidence" (R. 1564). Finally, the judge charged that the Greenglasses were accomplices and as such their testimony had to be considered "carefully" and acted upon with "caution" (R. 1565).

Under the circumstances, the jury could not possibly have mistaken the judge's resume of the Rosenbergs' contentions as an exhaustive statement.

(d) During their deliberations, the jury sent word to the judge that they desired to have the testimony of Ruth Greenglass read, beginning with the incident when Julius Rosenberg first approached her with respect to securing information for the Soviet Union (R. 1570). In response to a query from the judge, the jury fixed as the termination point of her testimony, David Greenglass' return home on furlough in January, 1945 (R. 1571). Thereupon, the direct testimony of Mrs. Greenglass covering the requested period was read to the jury (R. 1572). The judge declined to have the corresponding cross-examination read on the ground that the jury had not requested it (R. 1573). This refusal is claimed to have been prejudicial (No. 111, Pet. 37-39).

Any doubt whether the jury desired to hear the cross-examination was dispelled when the jurors,

after listening to the direct testimony, told the judge that they had heard what they wanted (R. 1572). Moreover, when defense counsel, in the presence of the jury, persisted in his demand that the cross-examination be read, the judge replied, "we will give the jury exactly what they request" (R. 1573). The jury then retired without making any further request. The inference is inescapable that the jury heard what they wanted.[13] Petitioners surely had no right to insist that they hear more.

5. (a) and (b) Petitioners contend that ~~the admission of~~ testimony evidencing their preferences for the Soviet Union and their activities and connections with the Communist Party ~~should~~ not have been admitted (No. 111, Pet. 40-46; No. 112, Pet. 30-38).

It is true, as petitioners contend, that if the only relevance of evidence is to show a propensity to commit crimes of the nature of the one being proved, it is not admissible. See, e.g., *Smith* v. *United States*, 173 F. 2d 181 (C.A. 9) (evidence of earlier robberies in a prosecution for robbery); *Lovely* v. *United States*, 169 F. 2d 386 (C.A. 4), certiorari denied, 338 U. S. 834 (evidence of an earlier rape in a prosecution for rape). But it is not enough to sustain a conviction under the Espionage Act to show that the defendant intended

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[13] The jury had previously been told by the Rosenbergs' counsel and by the judge in his charge that they had the right to have any testimony they wanted read to them (R. 1476, 1544).

to take certain information or that he intended to pass it to a certain person. The statute requires, as a separate element of proof, that the defendant have acted with "intent or reason to believe that [the material taken] is to be used to the injury of the United States or to the advantage of a foreign nation." Indeed, it was partly because of this explicit requirement that this Court sustained the provision against a challenge of indefiniteness. See *Gorin* v. *United States*, *supra*. And it was precisely because of this character of this statute that the admission of prior statements of opinion was sustained in *United States* v. *Molzahn*, 135 F. 2d 92 (C.A. 2), certiorari denied, 319 U. S. 774; see also, *Haupt* v. *United States*, 330 U. S. 631, 642; *Butler* v. *United States*, 138 F. 2d 977 (C.A. 7). Petitioners' argument confuses cases dealing with a general criminal intent accompanying proscribed conduct (see *Morissette* v. *United States*, 342 U. S. 246) and the specific intent of the espionage statute. The disputed evidence was clearly relevant to show petitioners' specific intent, charged in the indictment, to spy for the advantage of Russia. Although, as the Court of Appeals pointed out, "An American's devotion to another country's welfare cannot of course constitute proof that he has spied for that other country," nonetheless "this attitude bears on a possible motive for his spying, or on a possible intent to do so when there is other evidence in the case that he did such spying" (R. 1654-1655).

Moreover, the trial court's instructions to the

jury made it clear that the issue of "intent or reason to believe" was a separate one (R. 1554), and that this testimony had been admitted only for consideration on that issue; the court cautioned the jury "most strenuously that proof of Communist Party membership or activity does not prove the offense charged in this indictment, but may be considered by you solely on the question of intent which is one element of the crime charged here" (R. 1558).[14]

The Bentley testimony, of which petitioners also complain, was proper in order to show the link between the Party and the Soviet Union. It may be that sufficient notice of the character of the Party, and of its tightly knit, highly disciplined nature, exists, so that such proof was not necessary (cf. *Dennis* v. *United States*, 341 U.S. 494; *American Communications Association* v. *Douds*, 339 U.S. 382), but the testimony was nonetheless relevant on the issue of intent. As the Court of Appeals concluded in dealing with this contention, "If the jury believed [Bentley], she supplied the missing link connecting the Communist Party with the Soviet Union, and making Communist Party membership probative of motive or intent to aid Russia" (R. 1655).[15]

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[14] In addition, the court had stated the limited purpose of such testimony from the very first occasion the issue was raised (R. 181, 202, 1022). However true it may sometimes be that admonitions at the close of a trial do not erase entrenched misunderstanding, on this record it cannot be said that the jury did not understand this admonition. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 559.

[15] The evidence of Sobell's activities in the Party, going back three years before any acts in furtherance of the con-

(c) The Rosenbergs contend (Pet. 46-51) that it was error to admit Miss Bentley's testimony that between the fall of 1942 and November 1943, she received telephone calls from a person who identified himself as "Julius" (R. 991-993), and that as a result of these calls she would communicate with Golos, her superior in Soviet espionage (R. 975), following which she would receive further calls from "Julius" (R. 993).

But the evidence had already showed that Rosenberg had told Sobell and Greenglass that he had had contacts with Bentley (R. 261, 529); that Rosenberg had told the Greenglasses in January 1945 that the contact who would meet them in Albuquerque would bring greetings from himself (R. 689); that the contact, Harry Gold, was given the recognition sign, "I come from Julius," by Yakovlev (R. 822); and that Gold identified himself in that manner to the Greenglasses (R. 825). In addition, Miss Bentley testified that she had learned that "Julius" lived in Knickerbocker Village (R. 994), where Rosenberg in fact lived at the time of the calls (R. 1053).

It is clear that these circumstances constituted a proper foundation for the admission of Bentley's testimony. *Jarvis* v. *United States*, 90 F. 2d 243, 245 (C.A. 1), certiorari denied, 302 U.S. 705; *Andrews* v. *United States*, 78 F. 2d 274, 275 (C.A. 10); *Morton* v. *United States*, 60 F. 2d 696, 698 (C.A.

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spiracy were shown, was not too remote. *United States* v. *Haupt*, 152 F. 2d 771, 793 (C.A. 7), affirmed, 330 U.S. 631; *United States* v. *Molzahn*, 135 F. 2d 92 (C.A. 2), certiorari denied, 319 U.S. 774.

7), certiorari denied, 288 U.S. 607. In any event, the jury were told that they were free to accept or reject the inference that it was Rosenberg who called Bentley (R. 992).

Moreover, the evidence was not admitted to prove participation in a separate crime, as petitioners contend. It was admitted to corroborate (R. 991-992) Elitcher's testimony that Sobell had told him, after a visit to Rosenberg, that Rosenberg said he had talked to Bentley on the phone (R. 261; see p. 16, *supra*). In addition, it tended to support Greenglass' testimony that Rosenberg had told him he was about to flee because Bentley probably knew him (R. 529).

6. The Rosenbergs claim (Pet. 51-53) that it was error to admit the testimony of Ben Schneider, called as a rebuttal witness, in view of the fact that his name did not appear on the list of witnesses furnished to them prior to trial pursuant to 18 U.S.C. 3432.[16]

On cross-examination Julius and Ethel Rosenberg had both denied having any passport pictures taken (R. 1277-1278, 1361). On rebuttal, Schneider testified that the Rosenbergs and their children had passport photographs taken at his shop in May or June 1950, and that Julius told him that the pictures were needed to enable the Rosenbergs

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[16] That section, in relevant part, provides:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with * * * a list * * * of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each * * * witness."

to go abroad (R. 1427-1429). He also testified that the first time he saw any agent of the Government in connection with the case was the day before he took the witness stand (R. 1425).

This Court has explicitly held that the requirement of Section 3432 is inapplicable to rebuttal witnesses whose testimony is made necessary by defense testimony. *Goldsby* v. *United States*, 160 U.S. 70, is almost exactly in point. The Court there said (p. 76):

> The words "for proving the indictment," and the connection in which they are used, clearly refer to the witnesses relied upon by the prosecution to establish the charge made by the indictment. They do not extend to such witnesses as may be rendered necessary for rebuttal purposes resulting from the testimony introduced by the accused in his defence. Indeed, that they do not apply to rebuttal is obvious from the very nature of things, for if they did, as was well said by the trial judge, it would be impossible to conduct any trial.

See also *Gordon* v. *United States*, 289 Fed. 552, 554 (C.A. D.C.); *United States* v. *Schneider*, 21 D. C. Rep. 381, 413 (Sup. Ct. D. C.)

In any event, control of the admission of testimony in rebuttal is within the discretion of the trial court. *Goldsby* v. *United States*, *supra*, at 74. Conceivably, the defense might have claimed surprise and appealed to the trial judge's discretion for a reasonable adjournment before proceed-

ing with the Schneider testimony. Their failure to ask for more time precludes their present unsupported suggestion that lack of notice "cramped an investigation that may have demolished the testimony * * *" (No. 111, Pet. 53).[17]

7. The Rosenbergs challenge the sentences of death imposed upon them (Pet. 53-59). They argue that in the circumstances of this case, and in the light of the trial judge's remarks when he passed sentence, the death sentence violates the Eighth Amendment. By the same token, they challenge the holding of the Court of Appeals that it was beyond its power to consider the propriety of the sentence, because it was within the limits fixed by the statute.

Petitioners do not deny that Congress had the power to authorize the death penalty for wartime espionage. See *Cramer* v. *United States*, 325 U.S. 1, 45. And as the Court of Appeals said (R. 1671), sixty years of undeviating federal precedent establish that an appellate court has no power over a sentence which is within the limits allowed by the statute under which the defendant was convicted. E.g., *Garcia* v. *United States*, 40 F. 2d 338, 340-341 (C.A. 8); *Beckett* v. *United States*, 84 F. 2d 731, 732-733 (C.A. 6); *Scala* v. *United States*, 54 F. 2d 608, 611-612 (C.A. 7), certiorari denied, 285 U.S. 554; *Wallace* v. *United States*, 243 Fed. 300, 310 (C.A. 7); *Carpenter* v. *United States*, 280 Fed.

[17] *Logan* v. *United States*, 144 U.S. 263, on which petitioners rely, merely contains a dictum on the applicability of this statute, and even that statement is not inconsistent with the later *Goldsby* holding.

598, 601 (C.A. 4); *Smith* v. *United States*, 3 F. 2d 1021 (C.A. 9); *United States* v. *Ward*, 173 F. 2d 628, 630 (C.A. 2); *United States* v. *Cohen*, 177 F. 2d 523, 525 (C.A. 2), certiorari denied, 339 U.S. 914. In *Blockburger* v. *United States*, 284 U.S. 299, 305, this Court said:

> Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment on each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

Even if, however, there were power of appellate review in this area, the Rosenbergs would not be entitled to relief.[18] As Judge Frank so cogently pointed out in stating his separate views on this matter (R. 1677-1682), the enormity of their crime justified the extreme penalty authorized by the statute. They conspired to pass important secret information to Russia not only during 1944-1945, but also during the "cold war" in the following years. Theirs were not sporadic acts. Rather, their activities were deliberate, long continued, and unrepentant. As this Court said of a similar contention in the *Kawakita* case (slip opinion, p. 26),

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[18] In *Kawakita* v. *United States*, decided June 2, 1952, No. 570, O.T. 1951, this Court said (slip opinion, p. 26): "Whether a sentence [within the statutory limit] may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach."

"The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering."

8. Petitioner Sobell contends that his motion in arrest of judgment challenging the trial court's jurisdiction over his person should have been sustained (Pet. 45-47). An affidavit in support of the motion stated, in substance, that in August 1950, Mexican police unlawfully arrested him in Mexico City, beat him, and forcibly carried him across the American border, where he was met and taken into custody by agents of the United States (R. 1590-1593).

Although Sobell made a number of pretrial motions, and although there was testimony during the trial relative to his expulsion from Mexico (R. 1024-1031), and although the allegations in his post-trial affidavit were obviously known to him before and during the trial, he remained silent until after the jury had returned their verdict. The objection came much too late. It may have been waived by his consent to his removal from Laredo, Texas, to New York. Cf. *Ker* v. *Illinois*, 119 U. S. 436, 441; *Chandler* v. *United States*, 171 F. 2d 921, 934 (C.A. 1), certiorari denied, 336 U. S. 918. It was certainly waived by his failure to raise it before trial, or to show any "cause" for his failure to do so. Rule 12(b)(2), F. R. Crim. P.;[19] *Pon* v. *United States*, 168 F. 2d 373, 374 (C.A.

[19] This rule provides: "Defenses and objections based on defects in the institution of the prosecution or in the indictment

1); see *Ford* v. *United States*, 273 U. S. 593, 606.

Moreover, lack of jurisdiction over the person is not an issue that can be raised by a motion in arrest of judgment. Rule 34, F. R. Crim. P., limits such a motion to two grounds: (1) failure of the indictment to charge an offense, and (2) lack of jurisdiction of the offense charged. The present case falls into neither category. See *United States* v. *Zisblatt*, 172 F. 2d 740, 741-742 (C.A. 2); *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2), certiorari denied June 9, 1952, No. 411 Misc., O. T. 1951; cf. *United States* v. *Lias*, 173 F. 2d 685, 687 (C.A. 4).

It is clear also that even if Mexico summarily expelled Sobell, it has not been shown that its action was unlawful. Consequently, even if the United States requested such expulsion, he cannot complain. Cf. *Ker* v. *Illinois*, *supra*; *Chandler* v. *United States*, *supra*. Finally, even if Sobell had been brought into the United States unlawfully, his conviction is not thereby invalidated. *Frisbie*

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or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

The "jurisdiction" referred to in the last sentence obviously is jurisdiction of the subject matter, for the first sentence of the rule refers to failure of the indictment or information "to show jurisdiction in the court." *Pon* v. *United States*, 168 F. 2d 373, 374 (C.A. 1).

v. *Collins*, 342 U. S. 519, 522; *In re Johnson*, 167 U. S. 120, 125; *Ker* v. *Illinois*, *supra*, at 444; *Mahon* v. *Justice*, 127 U. S. 700; *Malone* v. *United States*, 67 F. 2d 339, 341 (C.A. 9).

9. (a) Sobell's principal contention is that, even accepting all the evidence against him, he was not shown to have participated in the Rosenberg-Greenglass-Gold-Yakovlev conspiracy, as charged; that, at most, it shows only that he participated in a separate conspiracy with Rosenberg and Elitcher. Consequently, he urges, his conviction cannot stand (Pet. 19-30).

Two recent decisions of this Court show that the courts below were correct in rejecting this argument. *Kotteakos* v. *United States*, 328 U. S. 750; *Blumenthal* v. *United States*, 332 U. S. 539. In the *Kotteakos* case, the Court held that separate conspiracies were involved because the proof showed that at least eight separate groups of defendants, who had made similar applications for government guarantees of loans, alleged to be for housing purposes, but in fact not so, were joined together only because the same broker acted in all of them. It was concluded that no group had any interest in the success or failure of the schemes of the others. Consequently, an indictment and joint trial as for a single conspiracy was bad. In the *Blumenthal* case, on the other hand, an indictment and trial on a charge of a single conspiracy to sell whiskey above OPA ceiling prices was upheld, even though the proof showed at least two agreements, one between the unknown owner of

the whiskey and two of the defendants who owned and managed the company which appeared to own the whiskey, and the other between those two defendants and the three remaining defendants. There was nothing in the record to show that these three remaining defendants, who made arrangements to sell the whiskey to outsiders, were aware of the identity and functions of members of the group other than the two with whom they dealt. Nonetheless, this Court stated (332 U. S. at 557-558):

> We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimately more general conspiracy [to sell the whiskey at over-ceiling prices]. In that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions. Nor does anything in the *Kotteakos* decision require this. The scheme was in fact the same scheme: the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

The test which emerges from these decisions is whether there is one ultimate project or scheme common to all the conspirators, without respect to whether there is detailed understanding by each of the modes by which the plan is carried out. Even if some of the participants had no reason to suppose that a particular person was in the conspiracy, all are bound as co-conspirators.[20]

Judged by this standard, the evidence here establishes that all the petitioners were participants in a single conspiracy to transmit secret information, without restriction as to type, to the Soviet Union.

It is plain, as far as the Rosenbergs are concerned, that their plans were not limited to information about the atomic bomb. Even before the Greenglass-Los Alamos episode, Rosenberg had sounded out Elitcher on his willingness to funnel from the Navy Department information of any sort that might be of value to the Soviet Union in its war effort (R. 207-210).[21] And long after he received the bomb data, Rosenberg continued to obtain information about other matters of a military nature, including a "sky platform" project (R. 517-518) and the use of atomic energy in airplanes (R. 519). In addition to having con-

[20] "* * * * the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." *Blumenthal* v. *United States*, *supra*, at 557.

[21] Indeed, Rosenberg said, as to whatever data Elitcher sent, "someone would evaluate them", and that Elichter need not worry about careful "choice" (R. 209).

tacts in New York and Ohio (R. 516), Rosenberg was constantly on the lookout for new recruits who might be able to furnish military information (R. 428, 438, 515). In short, the acquisition of bomb data was only part of a scheme whose ultimate goal was to transmit to the Soviet Union all conceivable varieties of information relating to the national defense of the United States.

Nor is there any doubt that Sobell, in dealing with the Rosenbergs, understood and shared this objective. Sobell (1) supplied Rosenberg with military information for transmission to Soviet Russia (R. 239, 260-261); (2) attempted to secure a classified ordnance pamphlet from Elitcher and told Elitcher to see Rosenberg in regard to the pamphlet (R. 245-249); (3) joined Rosenberg, after first having advised Elitcher to talk to Rosenberg before making a change, in attempting to dissuade Elitcher from leaving his job in the Navy Department so that Elitcher might be in a position to furnish information to a "contact" in Washington (R. 256-257); and (4) asked Elitcher for the names of young engineers who would be likely sources of military information (R. 254), commenting particularly on one such occasion that they should be people who "would not be suspected" (R. 255).

Sobell thus was clearly aware that the enterprise contemplated the use of numerous persons for the purpose of obtaining military information, without restriction as to kind. Compare *Nye & Nissen* v. *United States*, 336 U. S. 613. That he

may not have known that atom bomb data was being sought and supplied by other sources is unimportant. Conceding that "nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it * * *" (*United States* v. *Peoni*, 100 F. 2d 401, 403 (C.A. 2)), it is difficult to accept the contention that Sobell could not reasonably have supposed that the Rosenberg network, of which he was a member, involved transmitting tremendously important kinds of data. There is not a "different kind of a difference" (see Pet. 26) between data on the bomb and the large, albeit random, collection of data about the United States military effort that Sobell must have known was being undertaken.

Beyond this, it must be accepted as a commonsense datum that anyone engaged in Soviet espionage must have known that he was part of a network larger than himself and his contacts. He must also have known that the first condition for either the effectiveness or success of the operation lay in a studied and intricate secrecy. And he must, finally, have acquiesced in playing his part in this conspiracy without knowledge of, though with real concern for, the activities of his unknown co-conspirators. The state of mind of one whose loyalties are divided as the record shows Sobell's must have been, cannot fairly be narrowly confined, as that of the *Kotteakos* or *Blumenthal* conspirators might have been, to some single or relatively limited end. Compare *United States* v.

Manton, 107 F. 2d 834, 848-850 (C.A. 2), certiorari denied, 309 U. S. 664. Sobell spied, he encouraged another to spy, he was on the lookout for others to corrupt to the same end, all in conjunction with Rosenberg, whom he knew not to be operating alone. Whatever the ultimate scope of the "agreement" made by Sobell, as evidenced by what this record shows, the conspiracy of which he has been convicted is well within its limits. Cf. *United States* v. *Tramaglino* (C.A. 2, June 30, 1952).

(b) Sobell's further argument, supported by Judge Frank's partial dissent below, that the issue whether he was a party to a "giant" conspiracy or a separate conspiracy should have been submitted to the jury, is answered by the record. The court charged, in part, as follows (R. 1552):

> With these general principles as a guide you will approach the important question of whether the prosecution has proved beyond a reasonable doubt the existence of the conspiracy alleged in the indictment, and if such a conspiracy did exist, whether the defendants or any of them were parties to it and whether such defendants entered it with knowledge of its nature and purposes.
>
> You must first determine from all the evidence in the case * * * whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine, as to each defendant, whether or not he was a member of the conspiracy. He or she. In considering whether or not a particular defendant was a member of the conspiracy, you

> must do so—I repeat that: In considering whether or not a particular defendant was a member of the conspiracy, as to that particular element, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of a particular defendant from the evidence concerning his own actions, his or her own actions, his or her own conduct, his or her own declarations, or his or her own statements, and his or her own connection with the actions and conduct of others.

And later, the court also stated (R. 1560):

> Again I want to emphasize that the conspiracy in this case is a conspiracy to obtain secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature. To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country.

There is no way that the jury could, pursuant to these instructions, have found Sobell guilty without first finding that a comprehensive conspiracy existed and then deciding that Sobell was a part of it, believing that he understood and agreed

to the conspiracy with which he was in fact charged.[22] Cf. *Peters* v. *United States*, 160 F. 2d 319, 321 (C.A. 8) certiorari denied, 331 U. S. 825.

10. (a) Sobell also challenges (Pet. 39-40) the admission of evidence that he had gone to Mexico shortly before his arrest, that there he made efforts to leave, not to return to the United States, that he used a number of aliases while in Mexico, and that while there he sent letters under assumed names. This evidence was submitted to the jury as a legitimate basis for inferring a guilty mind, when viewed in conjunction with all the other evidence in the case (R. 1559-1560). This was plainly correct. *United States* v. *Heitner*, 149 F. 2d 105, 107 (C.A. 2), certiorari denied, 326 U. S. 727 (flight); *Robinson* v. *United States*, 114 F. 2d 475 (C.A. D. C.) (false name); 2 *Wigmore, Evidence* (2d ed. 1940) § 276(4).[23] If "guilty motive" is of any relevance (see Pet. 39), the evidence previously introduced clearly permitted the inference that it existed (*supra*, pp. 10-11, 17-18).

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[22] The record references in this and the preceding subsection are a sufficient answer to the Sobell argument that there was no substantial evidence against him (Pet. 41-43). The argument seems to come down to the proposition that circumstantial evidence cannot be used against him. This is not so. *United States* v. *Randall*, 164 F. 2d 284, 289 (C.A. 7); *United States* v. *Rollnick*, 91 F. 2d 911 (C.A. 2); *Peters* v. *United States*, *supra*.

[23] *Wigmore* states: "It is today universally conceded that the fact of an accused's flight, * * * assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. * * * This principle has been so many times sanctioned that its frequent modern repetition has become redundant; no further judicial attention should be paid to any bill of exceptions so presumptuous as to raise the question."

(b) Sobell further challenges (Pet. 40-41) the admission of an entry contained on an official record made in Sobell's presence by an inspector of the Immigration and Naturalization Service shortly after the Mexican authorities brought Sobell to his office, which stated that he had been "deported from Mexico". (R. 1025, 1030-1031; Pet. 40-41). It is claimed to be irrelevant and hearsay.

The record was plainly relevant to show that Sobell's return to the United States was not voluntary, and was thus probative to show flight.

Moreover, it was competent. The inspector who made the entry testified that he was under a duty to do so in the case of every deportee from Mexico (R. 1027, 1036), and that he made the entry in the regular course of his duties on the basis of personal observation, as was his custom in cases of similar character (R. 1027). Thus, the trial court correctly admitted the entry under the business entry statute, 28 U. S. C. 1732.[24] In addition,

[24] This section provides:

"In any court of the United States * * *, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

the entry was admissible as an "official statement" made in the course of the entrant's official duties as a federal employee. 28 U. S. C. 1733;[23] *United States* v. *Ward*, 173 F. 2d 628, 629-630 (C.A. 2); *United States* v. *Grayson*, 166 F. 2d 863, 868 (C.A. 2). And, in addition, the entrant personally appeared at the trial and was subject to cross-examination (R. 1031-1037).

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[23] This section provides: "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

CONCLUSION

The Court of Appeals "scrutinized the record with extraordinary care to see whether it contained any of the errors asserted" (R. 1644). It stated further that, although it is inclined to regard as harmful an error otherwise probably harmless where it regards the sentence as unduly harsh, no such errors affecting the Rosenbergs were found (R. 1671). Since most of the issues affect both Sobell and the Rosenbergs, they have thus been reviewed with unusual care and thoroughness as to all the petitioners, and resolved against them. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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